IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO.9426 OF 2005

Sarjerao Shamrao Devane .. ..Petitioner

Versus

1.Dr.Narendra Baburao

Kanchankoti & Anr. .. ..Respondent

Mr.N.J.Patil for petitioner

Mr.A.M.Kulkarni for Respondent nos.1 and 2

CORAM : P.V.KAKADE, J.

DATE : 29th MARCH 2006

P.C.:

1. Heard both sides. Perused the record.

2. This petition filed by the tenant under Article 226 of the Constitution of India against the Order passed by Addl. District Judge, Kolhapur dated 8th August, 2005 dismissing his appeal and confirming the judgment and order passed by Trial Court in Regular Civil Suit

No.566/95 dated 20.10.2001 decreeing the suit for vacant possession of the suit premises under the provisions of the Bombay Rent Act.

3. The respondents-plaintiffs are the owners of the suit property being City Survey No.2383/1-B/2-3/4, C-Ward Kolhapur. They have purchased the suit property in the year 1992. Since 1984 the defendant was the tenant of the suit premises on a rent of Rs.265/= per month. The premises is in possession of the defendant is a shop premises wherein he is running medical shop, which is about 250 sq. ft. The plaintiff no.2 is the son of plaintiff no.1 and both of them are medical practitioners. Wife of plaintiff no.2 is also a medical practitioner. She is Homoeopathic consultant and for want of accommodation, she had no separate consulting room for the purpose of admitting patient for their treatment and to provide good facilities to them and hence the plaintiffs required the suit premises for bonafide and reasonably for their personal use and occupation of the suit premises. The defendant contested the suit, inter alia, denying the allegations and sought dismissal of the suit.

4. The learned trial judge after hearing both the parties and on the basis of available evidence came to the conclusion that the plaintiffs had proved that the suit premises was required reasonably and bonafide for their use and occupation under Section 13(1)(g) of the Bombay Rent Act, 1947. It was further held that the plaintiffs would suffer greater hardship if the suit came to be dismissed and as sch the suit came to be decreed and eviction order was passed.

. The Appeal was carried to the District Court. The learned Addl. District Judge after hearing both the parties came to the conclusion that the reasoning adopted and finding recorded by the trial court on the basis of available evidence is just, legal and proper and therefore, dismissed the appeal. Hence the petition.

5. At the outset it may be noted that the only question for my consideration against the concurrent findings recorded by both the courts below, is to the effect whether the evidence on record is properly appreciated by the lower appellate court, if so, the interference would be justified or not.

. The learned counsel for the petitioner submitted that House Assessment extract for the year 1987-88, it was brought on record, showed that there were 16 rooms in possession of the plaintiff, however, it is pointed out by the lower appellate court that out of 16 rooms, Sanitary block, painter room, bathroom and godown premises etc. were also included. It is an admitted position that plaintiff no.1 is a medical practitioner, who runs his own hospital in the premises and the case sought to be made out on behalf of the plaintiff is to the effect that the present accommodation is not adequate for use, as hospital consulting room not only for plaintiff but also for plaintiff and his wife all who are medical professionals. The evidence therefore, appears to be properly appreciated by both the courts below to the effect that the Tax Assessment record showing 16 rooms is quite misleading and therefore, it cannot be acted in order to hold that there is sufficient premises available in the possession of the plaintiffs.

. It was further submitted on behalf of the petitioner that the plaintiff and his wife are permanently settled at Belgaon where they are practicing medicine, however, it is obvious that they are practicing

at Belgaon and cannot shift from Belgaon to Kolhapur for want of accommodation for which purpose the suit premises is required, moreover the very fact that they are having consulting practice at Belgaon which is hardly distance from three hours from Kolhapur does not mean that they would not practice at Kolhapur as well.

6. The learned counsel for the petitioner further submitted that the lower appellate court has recorded finding to the effect that both the parties would suffer equally hardship if the decree is passed and under such circumstances the petitioner who has no other premises to shift his business should be held to be the person who would suffer greater hardship. In this regard it must be noted that taking into account the fact and circumstances reveals from the evidence on record it is undoubtedly true that both the parties would suffer equally hardship. However, at this juncture it must be pointed out that there is evidence on record to show that pending the suit suitable accommodation in the same market area, at the instance of about 500 ft. from the suit premises, was shown to the petitioner which was available for his occupation, but he did not accept the said proposal. In view of this position, I am of the view that though he

would suffer equally hardship, the argument cannot be available for the petitioner that he should suffer greater hardship. Moreover, settled legal position is to the effect that when in case there is finding recorded by the court below that there would be equal hardship to the parties, under such circumstances the decree would be passed in favour of the landlord. This view supported by the ruling of this Court in the case of **Bhaskar Digambar Choudhary vs. Bhagwan Vishwanath Fadnis reported in 1976 BLR 454**. The learned single judge after referring to Section 13(2) of the Bombay Rent Act has observed that said provision is in the nature of restriction on the landlord's right to get possession of the premises even when he proves his reasonable and bona fide requirements of the premises as contemplated under Section 13(1)(g) of the said Act. It is also in the nature of a fetter on the Court's power to pass a decree of eviction against the tenant, and therefore, it has to be construed accordingly. So construed the said provision means that where a court comes to the conclusion that greater hardship will be caused to the tenant by losing the premises than to the landlord by not securing them, the court shall not evict the tenant. In all other cases the court has power to evict the tenant. It, therefore,

follows that where the court finds that hardship is equal on both sides, the said restriction or fetter does not operate. After observing these aspects, it was held that under such circumstances, the balance of the principle of hardship must held in favour of the landlord when evidence on record show that there would be equal hardship to both the parties.

7. In view of this position, I have no hesitation to hold that the lower appellate court has also correctly dealt with the issue of greater hardship in this regard.

8. For the reasons recorded above, I hold that the reasoning adopted and findings by both the courts below are just, legal and proper and therefore, it would brook no interference. In the result, the petition stands dismissed with no order as to costs.

9. At this juncture the learned counsel for the petitioner made request that some time should be granted to vacate the suit premises. In view of the facts and circumstances, the decree for eviction shall not be effected for the period of six months from the date of this order on condition that the petitioner and all adult

members of his family shall furnish undertaking to this effect and shall also state therein that they shall not create any third party interest in the suit premises and shall continue to pay rent as per the agreement. The undertaking to furnish within three weeks from the date of this order.